

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JACOB RAMIE PRATT
Plaintiff,
v.
MINNIX, ET AL.
Defendants.

3:10-cv-00615-RCJ-VPC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

July 1, 2011

11 This Report and Recommendation is made to the Honorable Robert C. Jones, Chief United
12 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
13 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary judgment
14 (#22).¹ Plaintiff opposed (#25), filed additional affidavits in support of his opposition (#27), and
15 submitted a supplemental response to the video (#29). Defendants replied (#26). The court has
16 thoroughly reviewed the record and recommends that defendants' motion for summary judgment
17 (#22) be denied.

I. HISTORY & PROCEDURAL BACKGROUND

19 Plaintiff Jacob Ramie Pratt (“plaintiff”), a *pro se* inmate, is currently incarcerated at Ely State
20 Prison (“ESP”) in the custody of the Nevada Department of Corrections (“NDOC”) (#5). Plaintiff’s
21 civil rights complaint, filed on October 1, 2010, alleges that defendants Minnix, Perkins, Horsley,
22 Deeds, Postma, and Does 1-4, employed excessive force against him on January 31, 2010, during
23 a planned cell extraction. *Id.* Plaintiff also claims that defendants were deliberately indifferent to
24 his medical need for treatment of injuries he sustained during removal from his cell. *Id.* The court
25 screened plaintiff’s complaint pursuant to 28 U.S.C. § 1915 and allowed plaintiff’s excessive force
26 claim against all defendants and his deliberate indifference claim against defendants Minnix and

¹ Refers to the court's docket numbers.

1 John Doe #4 to proceed (#4).

2 In count one of plaintiff's complaint, he claims that defendant Minnix "ordered correctional
 3 officers to extract inmates who . . . flooded . . . their cells" (#5, p. 5). Plaintiff admits to flooding
 4 his cell "to bring attention to several assaults [sic] he was watching happen from his cell." *Id.* At
 5 approximately 6:30² on January 31, 2011, correctional officers approached plaintiff's cell door. *Id.*
 6 Defendant Minnix instructed plaintiff to "cuff up" through the cell door and then sprayed a chemical
 7 agent into plaintiff's cell. *Id.* Plaintiff claims that after an additional use of the chemical agent
 8 against him without a warning to "cuff up," defendants Minnix and Horsley "told approximately ten
 9 (10) correctional officers to line up and prepare to enter Plaintiff's cell." *Id.* at 5-6. Plaintiff states
 10 that prior to entering his cell, defendant Minnix told defendant Perkins to turn off the video camera
 11 he was using to record the cell extraction. *Id.* at 6. Defendant Perkins complied. *Id.*

12 Defendants entered plaintiff's cell, subdued and restrained him, including removing a weapon
 13 from his possession. *Id.* Plaintiff claims that while restrained he was punched in the face ten to
 14 twelve times by defendant John Doe #1, rammed into a slider door by defendant John Doe #2, and
 15 slammed into a wall repeatedly by defendant Postma and/or defendant Deeds. *Id.* Plaintiff states
 16 that he was pinned against a wall and defendants John Doe #3 and #4 pinched and twisted his nipples
 17 and body slammed him into the floor at defendant Minnix's direction. *Id.* Finally, plaintiff claims
 18 that defendant Postma rammed him into two slider doors, while holding a handful of plaintiff's hair,
 19 and defendant Deeds "beat Plaintiff's head into his . . . cell wall multiple times." *Id.* These acts
 20 resulted in plaintiff "bleeding badly with an eye swollen shut, a broken nose and cut lips." *Id.*
 21 Plaintiff claims his entire face was a deep purple color after the attack. *Id.*

22 Plaintiff's second count states that defendants were deliberately indifferent to his medical
 23 needs because they refused to provide medical treatment for his injuries for five days following the
 24 alleged attack. *Id.* at 7. Specifically, plaintiff claims that defendant Minnix prevented medical
 25 personnel from attending to his injuries immediately after the attack, permitting them only to wipe
 26 his face with gauze. *Id.* Further, plaintiff alleges that once placed back into a cell, senior officer

27 ² Plaintiff does not specify in his complaint whether the extraction took place at 6:30 a.m. or 6:30 p.m.
 However, defendants' motion specifies that the cell extraction occurred in the evening (#22, p. 3).

1 John Doe #4 would not allow him to file a medical kite, nor was he provided an opportunity to wash
2 off the chemical agent that defendants used against him. *Id.*

3 Defendants filed the present motion for summary judgment on March 15, 2011, seeking
4 summary judgment in favor of all defendants for plaintiff's excessive force claim, and for defendants
5 Horsley, Perkins, Postma, and Deeds for plaintiff's deliberate indifference to a medical need claim
6 (#22). Defendants explain that "a number of correctional officers led by former NDOC Lieutenant
7 James Minnix used physical force to sequentially remove approximately a dozen inmates from their
8 cells via a process NDOC commonly refers to as 'cell extraction' or a 'planned-use-of-force.'" *Id.*
9 at 2. Defendants Horsley, Postma, and Deeds participated in the extraction under defendant
10 Minnix's direction, while defendant Perkins operated the video camera to document the process
11 pursuant to NDOC policy. *Id.* at 3. Defendants provide a description of the cell extraction in their
12 brief, attach defendants' declarations relating the events, and also submit to the court a video
13 recording of the extraction.³ Defendants also attach Operating Procedure ("OP") 405 for ESP (#22-
14 1, p. 2-15).⁴ The specific facts detailed below are based on defendants' briefing and declarations,
15 which the court carefully reviewed.

16 When the cell extraction team approached plaintiff's cell door, the light was off (#22, p. 3).
17 Defendant Minnix instructed plaintiff to "hook up," and warned plaintiff that they would administer
18 chemicals if he failed to comply. *Id.* During this time, defendant Pratt notified defendant Minnix
19 that the tape in the video camera was running low, and defendant Minnix ordered someone to go get
20 a new tape and battery for the camera. *Id.*; Exh. E, #22-2, p. 2. At the same time, defendant Horsley

25 4 Defendants fail to authenticate the copy of OP 405, which they attach as support for their
26 motion for summary judgment (#22-1, p. 2-15). Further, the cell extraction, which is the basis for plaintiff's
27 complaint and defendants' present motion, occurred on January 31, 2010 (#s 5 & 22), while the version of
OP 405 that is attached to defendants' motion became effective two months after the incident, on March 31,
2010 (#22-1, p. 2). As OP 405 is not properly before the court, nor is it applicable to the current case, the
court will not consider this evidence in its Report and Recommendation.

1 looked into plaintiff's cell and saw that "[he] had some material wrapped around his face and was
2 holding his mattress, rolled up as if to use it as a makeshift shield" (#22, p. 3 & #22-1, p. 18).

3 Defendant Minnix then sprayed tear gas into plaintiff's cell, offered plaintiff a second
4 opportunity to hook up, and moved on to another inmate's cell (#22, p. 3). A short time later,
5 defendants returned to plaintiff's cell and defendant Minnix asked plaintiff if he was ready to
6 comply. *Id.* at 4. Defendant Minnix sprayed tear gas into plaintiff's cell again and once more asked
7 if plaintiff was ready to comply. *Id.* The cell extraction team then entered plaintiff's cell; however,
8 the video camera ran out of tape so the events that took place in the cell were not recorded. *Id.*; Exh.
9 E, #22-2, p. 2. Defendant Perkins claims that he "did not observe what took place in [plaintiff's] cell
10 as [he] wait[ed] by the stairs on the tier for a new tape to be delivered" (#22-2, p. 2).

11 Defendants note that during the cell extraction, plaintiff stabbed senior correctional officer
12 Stubbs with a make-shift weapon, which defendant Deeds was "subsequently able to wrestle . . .
13 from [plaintiff]" (#22, p. 4 & #22-1, p. 25). The cell extraction team secured plaintiff in restraints
14 and escorted him from the cell so that he could receive medical attention and the team could "strip
15 out his cell pursuant to ESP's standard operating procedure" (#22, p. 4).

16 The video recording of the extraction resumes "with [plaintiff] being held face against the
17 wall by several officers as his cell was being 'stripped out' pursuant to prison policy and while he
18 was awaiting a medical evaluation to determine whether he needed medical treatment." *Id.* At this
19 time, defendant Minnix instructed officer Stubbs to show his puncture wound to the video camera,
20 which was caused by plaintiff's attack with the hand-crafted weapon. *Id.* Defendant Minnix also
21 showed the camera the weapon plaintiff used. *Id.* At defendant Minnix's direction, the officers
22 holding plaintiff twice took him down to the ground. *Id.* Medical personnel evaluated plaintiff's
23 injuries, noting that he suffered "a swollen right eye, a bloody nose and some bruising and abrasions
24 on his body," injuries that correctional nurse Gardner determined did not require medical treatment.
25 *Id.* at 4-5; Exh. G, #22-2, p. 7. Defendants Horsley, Postma, Deeds, and Perkins all submitted
26 declarations stating that they did not witness or apply force that they would regard as excessive (#22-
27 1, p. 18, 22, 25 & #22-2, p. 3).

1 Given this sequence of events, defendants first argue that applying the *Hudson* factors to the
 2 facts in this case, reveals that defendants used reasonable force, necessary to subdue plaintiff. *Id.*
 3 at 6. Defendants specifically note that plaintiff's injuries were not serious; plaintiff resisted
 4 extraction by turning his cell lights off and refusing to comply, making force necessary; the officers
 5 applied force "commensurate with the need to secure [plaintiff];" defendants perceived a threat
 6 posed by plaintiff and his use of a weapon; and, defendants sought to temper the force by requesting
 7 plaintiff's compliance on several occasions. *Id.* at 6-8. Defendants contend that plaintiff's
 8 allegations of force, including his claim that he was punched in the face a dozen or more times in
 9 his cell, are not supported by the video recording and the officers' declarations. *Id.* at 8-9.
 10 Specifically, defendants believe that the officers' statements are "consistent with the recording of
 11 the incident as opposed to [plaintiff's] declaration," which defendants believe is "self-serving [and]
 12 lacking detailed facts and any supporting evidence." *Id.* at 8.

13 Defendants also argue that defendant Perkins simply recorded the cell extraction and,
 14 therefore, did not participate in removing plaintiff from his cell, nor did he observe the cell
 15 extraction, as he was in the stairwell awaiting a new tape and battery. *Id.* at 10. Defendants believe
 16 defendant Perkins should be awarded summary judgment and dismissed. *Id.* Defendants further
 17 argue that defendants Horsley, Postma, and Deeds acted at defendant Minnix's direction; therefore,
 18 defendants "request that the Court evaluate their personal involvement only in terms of the degree
 19 of force that they used on [plaintiff]," not for the decision to use physical force. *Id.* Additionally,
 20 defendants argue that defendants Horsley, Perkins, Postma, and Deeds should not be held
 21 accountable for count two, deliberate indifference to plaintiff's medical needs, as they did not
 22 personally participate in any purported denial of medical treatment.⁵ *Id.*

23 Finally, defendants argue that if the court believes there is a genuine issue of material fact
 24 in the case, defendants are entitled to qualified immunity "because it would not be reasonable for
 25 them to conclude under the circumstances that what they did was illegal." *Id.* at 12. Defendants

26 ⁵ As the court noted above, when the court screened plaintiff's complaint it only allowed the
 27 deliberate indifference to medical needs claim to proceed against defendants Minnix and John Doe #4.
 Therefore, defendants Horsley, Perkins, Postma, and Deeds are not names as defendants for plaintiff's second
 count.

1 state that because the officers “did not independently decide to use force on [plaintiff],” because
 2 plaintiff “attacked [them] with a weapon” during the extraction, and because defendant Minnix’s
 3 motivation in ordering the use of force was not malicious, the court should find that their actions are
 4 protected by qualified immunity. *Id.*

5 In his opposition, plaintiff explains that the relevant acts for the excessive force claims
 6 included in his complaint relate to force that “was applied after plaintiff was restrained and totally
 7 [sic] compliant” (#25, p. 2). Plaintiff explains:

8 What ever happened when that door on plaintiff’s cell opened and the time from then
 9 till plaintiff was compliant, is not at issue here. Plaintiff in fact chose to fight the
 10 officers that he knew wished to assault him, and its [sic] alleged plaintiff stabbed an
 11 officer durring [sic] the extraction which plaintiff has freely admitted. Ten officers
 12 in riot gear, with helmets with face sheilds [sic], body armour [sic], boots, and elbow
 13 and knee pads all dog piled plaintiff. That was the end of plaintiff’s “fight.” And
 14 that force was needed and plaintiff knows that and has no problem with that.
 Plaintiff stopped all his struggling at that point. There was no reason for plaintiff to
 15 resist unless plaintiff wanted a broken arm, which plaintiff did not. To be clear
 16 plaintiff is not alleging an Eighth amendment violation for force used to subdue him
 17 and secure him.

18 *Id.* at 8. Rather, plaintiff contends that the constitutional violations related to the force applied
 19 during the cell extraction are as follows: (1) defendant Perkins turned off the video camera “so
 20 officers could assault plaintiff un documented [sic], which he believes “goes to . . . failure to
 21 protect;” (2) defendant Postma rammed plaintiff’s head into the sally port doors, which plaintiff
 22 argues is excessive force; (3) defendant Deeds “beat plaintiff’s head in to a wall,” which plaintiff
 23 believes is excessive force; (4) defendant Horsley, a senior corrections emergency response team
 24 member, “knew plaintiff should not have been extracted from his cell,” but did not stop the event
 25 and, as a result, “under his eye and evidently with his own participation several inmates were
 26 assaulted,” which plaintiff believes is a failure to protect. *Id.* at 9, 11-13. Plaintiff also states that
 27 defendant Minnix threatened inmates on the unit by stating that if anyone challenged his authority
 they would “bleed like bitches,” directed defendant Perkins to turn off the video camera prior to
 extracting plaintiff from his cell, interfered with the administration of medical assistance to plaintiff
 following the cell extraction, and ordered officers holding plaintiff to take him to the ground if he
 resists. *Id.* at 2, 5, 8, 13. Plaintiff claims he “was punched in the face a dozen or so times,” but he

1 does not identify a specific attacker in his opposition. *Id.* at 8.

2 Plaintiff's opposition primarily addresses his excessive force claims in count one of his
3 complaint; however, plaintiff also references his deliberate indifference claim and concedes that
4 count two does not involve the actions of defendants Perkins, Postma, Deeds, and Horsley. *Id.* at
5 13. Rather, plaintiff contends that defendant Minnix "interfered with Mr. Garner," only allowing
6 him to wipe plaintiff's face, rather than treat plaintiff's injuries. *Id.* at 6. Plaintiff also attaches two
7 medical kites, one that documents that plaintiff was seen by a physician on February 5, 2010, and
8 another that plaintiff submitted which states that he is aware that no other treatment is available for
9 a concussion, but he "just want[s] to have this in [his] medical chart for if it gets worse." *Id.* at 35,
10 37.

11 Plaintiff also attaches two declarations (#25, pp. 39-43) and submits several affidavits (#27)
12 from inmates regarding the events that occurred on January 31, 2011. Additionally, plaintiff submits
13 a supplement to his opposition because he did not have an opportunity to view the video until after
14 he submitted his opposition (#29). Defendants provided plaintiff with a letter stating that they did
15 not oppose a supplement to his opposition, given that ESP officials temporarily misplaced the video.
16 *Id.* at 3. As the court is not considering the video evidence, it is unnecessary for the court to detail
17 the arguments presented in plaintiff's supplement to his opposition.

18 In their reply, defendants note that plaintiff "takes no issue with the force Defendants used
19 to enter his cell and restrain him but contends excessive force was applied after he has already been
20 placed in restraints and was compliant" (#26, p. 2). Defendants seem to suggest that the video
21 recording of the events, including plaintiff's take downs, passage through the sally port doors, and
22 return to his cell when "coupled with Defendants' declarations, collectively indicate no malicious
23 acts by Defendants." *Id.* at 3.

24 Defendants admit that they did not record the entire cell extraction, and note that generally
25 "the testimony of one person against another can generate a genuine issue of material fact." *Id.*
26 However, defendants argue that because plaintiff "cannot identify who allegedly hit him, who
27 rammed him into the sally port door as he was taken to the hallway, and who pinched him while he

1 was standing in the hallway,” there is no issue of fact in this case. *Id.* Further, defendants contend:
 2 “Whatever injuries Plaintiff sustained off-camera would have taken place shortly after the officers
 3 discovered he had a weapon. [Defendants] had to make judgment calls in a tense and uncertain
 4 situation.” *Id.* at 4. Defendants also point out that as to defendants Horsley and Perkins, they were
 5 participating in a cell extraction, and the “deliberate indifference standard does not apply in the
 6 context of quelling a prison disturbance.” *Id.* Defendants attach to their reply an unauthenticated
 7 image of the weapon plaintiff used to attack officer Stubbs (#26-1).

8 The court notes that the plaintiff is proceeding *pro se*. “In civil rights cases where the
 9 plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the
 10 benefit of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir.
 11 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

12 II. DISCUSSION & ANALYSIS

13 A. Discussion

14 1. Summary Judgment Standard

15 Summary judgment allows courts to avoid unnecessary trials where no material factual
 16 disputes exist. *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).
 17 The court grants summary judgment if no genuine issues of material fact remain in dispute and the
 18 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must view
 19 all evidence and any inferences arising from the evidence in the light most favorable to the
 20 nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). However, the Supreme
 21 Court has noted:

22 [W]e must distinguish between evidence of disputed facts and
 23 disputed matters of professional judgment. In respect to the latter,
 24 our inferences must accord deference to the views of prison
 25 authorities. Unless a prisoner can point to sufficient evidence
 26 regarding such issues of judgment to allow him to prevail on the
 27 merits, he cannot prevail at the summary judgment stage.

28 *Beard v. Banks*, 548 U.S. 521, 530 (2006). Where reasonable minds could differ on the material
 29 facts at issue, however, summary judgment should not be granted. *Anderson v. Liberty Lobby, Inc.*,
 30 477 U.S. 242, 251 (1986).

1 The moving party bears the burden of presenting authenticated evidence to demonstrate the
 2 absence of any genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
 3 (1986); *see Orr. v. Bank of America*, 285 F.3d 764, 773-74 (9th Cir. 2002) (articulating the standard
 4 for authentication of evidence on a motion for summary judgment). Once the moving party has met
 5 its burden, the party opposing the motion may not rest upon mere allegations or denials in the
 6 pleadings, but must set forth specific facts showing that there exists a genuine issue for trial.
 7 *Anderson*, 477 U.S. at 248. Rule 56(c) mandates the entry of summary judgment, after adequate time
 8 for discovery, against a party who fails to make a showing sufficient to establish the existence of an
 9 element essential to that party's case, and on which that party will bear the burden of proof at trial.
 10 *Celotex*, 477 U.S. at 322-23.

11 **B. Analysis**

12 Defendants ask this court to grant summary judgment on plaintiff's excessive force claim
 13 against all defendants, arguing that the force applied to extract plaintiff from his cell was necessary
 14 and reasonable given the need to restore order to the unit and the threat presented by plaintiff's use
 15 of a weapon (#22, p. 9). Further, defendants request that the court grant summary judgment as to
 16 defendants Perkins and Horsley, as they did not personally participate in the cell extraction, and also
 17 grant summary judgment as to defendants Horsley, Perkins, Postma, and Deeds related to plaintiff's
 18 deliberate indifference claim, as they did not personally participate in denying plaintiff medical
 19 treatment. *Id.* at 10. Finally, if the court finds that there is a genuine issue of material fact,
 20 defendants believe that they are entitled to qualified immunity. *Id.* at 12.

21 Plaintiff claims that after defendants Postma, Deeds, and several John Doe officers restrained
 22 and disarmed him in his cell, they engaged in excessively violent acts against him, including
 23 punching him, slamming his head into a sally port door and the wall of his cell, body slamming him
 24 to the ground, and pinching and twisting his skin (#25, p. 4, 9-13). Plaintiff argues that "once he
 25 was disarmed, restrained, and compliant, force should have ceased to be applied." *Id.* at 19. Plaintiff
 26 further alleges that defendant Minnix instructed defendant Perkins to turn the video camera off to
 27 allow the defendants to assault plaintiff undocumented, and directed officers to take plaintiff down

1 if he did not comply. *Id.* at 9. Plaintiff further believes that defendants Pratt and Horsley should be
 2 held accountable for failing to protect him from the violent acts. *Id.* at 13. Plaintiff believes that
 3 there is a “serious genuine issue of material fact regarding Defendants’ use of excess [sic] force on
 4 Plaintiff on January 31, 2010,” which precludes summary judgment. *Id.* at 20.

5 **1. Authentication of Evidence**

6 Only evidence that would be admissible at trial may be considered by the court in ruling on
 7 a motion for summary judgment. *Orr*, 285 F.3d at 773 (9th Cir. 2002) (citing *Beyene v. Coleman*
 8 *Security Services, Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988)). Rule 56(e) provides:

9 Supporting and opposing affidavits shall be made on personal knowledge, shall set
 10 forth such facts as would be admissible in evidence, and shall show affirmatively that
 11 the affiant is competent to testify to the matters stated therein. Sworn or certified
 12 copies of all papers or parts thereof referred to in an affidavit shall be attached thereto
 13 or served therewith. The court may permit affidavits to be supplemented or opposed
 14 by depositions, answers to interrogatories, or further affidavits. When a motion for
 15 summary judgment is made and supported as provided in this rule, an adverse party
 16 may not rest upon the mere allegations or denials of the adverse party’s pleading, but
 17 the adverse party’s response, by affidavits or as otherwise provided in this rule, must
 18 set forth specific facts showing that there is a genuine issue for trial. If the adverse
 19 party does not so respond, summary judgment if appropriate, shall be entered against
 20 the adverse party.

21 Fed. R. Civ. P. 56(e).

22 The Ninth Circuit has repeatedly held that unauthenticated documents – documents that do
 23 not have a proper foundation – may not be considered on a motion for summary judgment. *Orr*, 285
 24 F.3d at 773 (citing *Cristobal v. Seigel*, 26 F.3d 1488, 1494 (9th Cir. 1994), *Hal Roach Studios, Inc.*
 25 v. *Richard Feiner & Co.*, 896 F.2d 1542, 1550-51 (9th Cir. 1989), *Beyene v. Coleman Security*
 26 *Services, Inc.*, 854 F.2d 1179, 1182 (9th Cir. 1988), *Canada v. Blain’s Helicopters, Inc.*, 831 F.2d
 27 920, 925 (9th Cir. 1987) and *Hamilton v. Keystone Tankship Corp.*, 539 F.2d 684, 686 (9th Cir.
 1976)); *see also United States v. Dibble*, 429 F.2d 598 (9th Cir. 1970) (“a plaintiff seeking summary
 judgment who has failed to produce such evidence on one or more essential elements of his cause
 of action is no more entitled to a judgment... than is a plaintiff who has fully tried his case and who
 had neglected to offer evidence sufficient to support a finding on a material issue upon which he
 bears the burden of proof”) (internal citations omitted). For the court to consider the evidence

1 attached to a motion for summary judgment, the documents must be “authenticated by and attached
2 to an affidavit that meets the requirements of [Fed.R.Civ.P.] 56(e) and the affiant must be a person
3 through whom the exhibits could be admitted into evidence.” *Canada*, 831 F.2d at 925 (citation
4 omitted).

5 Defendants fail to authenticate the video recording of the cell extraction, the photograph of
6 the weapon plaintiff used on officer Stubbs, or the copy of OP 405. Therefore, the court will not
7 consider this evidence in its review of the present motion. However, the court notes that even if it
8 had relied on the video recording of the cell extraction, defendants admit to not recording their
9 removal of plaintiff from his cell, which is central to the instant dispute regarding the reasonableness
10 of the force employed once plaintiff was restrained. It is unlikely that the video recording would
11 resolve outstanding questions of fact about the force used in plaintiff’s cell after he was restrained.

12 **2. Excessive Force**

13 **i. Merits of the Claim**

14 When a prison official stands accused of using excessive physical force in violation of the
15 cruel and unusual punishment clause of the Eighth Amendment, the question turns on whether force
16 was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically
17 for the purpose of causing harm. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (citing *Whitley v.*
18 *Albers*, 475 U.S. 312, 320-21 (1986)). In determining whether the use of force was wanton and
19 unnecessary, it is proper to consider factors such as the need for application of force, the relationship
20 between the need and the amount of force used, the threat reasonably perceived by the responsible
21 officials, and any efforts made to temper the severity of the forceful response. *Id.* at 7.

22 Additionally, the extent of a prisoner’s injury is also a factor that may suggest whether the
23 use of force could plausibly have been thought necessary in a particular situation. *Id.* Although the
24 absence of serious injury is relevant to the Eighth Amendment inquiry, it is not determinative. *Id.*
25 That is, use of excessive physical force against a prisoner may constitute cruel and unusual
26 punishment even though the prisoner does not suffer serious injury. *Id.* at 9. Although an inmate
27 need not have suffered serious injury to bring an excessive force claim against a prison official,

1 “[not] every malevolent touch by a prison guard gives rise to a federal cause of action. *Id.* “Not
 2 every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,
 3 violates a prisoner’s constitutional rights.” *Id.* (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.
 4 1973), *cert. denied sub nom. Johnson*, 414 U.S. 1033 (1973)). The Eighth Amendment’s prohibition
 5 on cruel and unusual punishments necessarily excludes from constitutional recognition *de minimis*
 6 uses of physical force. *Id.* at 9-10.

7 As the balancing of relevant factors in excessive force cases “nearly always requires a jury
 8 to sift through disputed factual contentions, and to draw inferences therefrom, [the Ninth Circuit has]
 9 held on many occasions that summary judgment or judgment as a matter of law in excessive force
 10 cases should be granted sparingly.” *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002); *see also*
 11 *Lolli v. County of Orange*, 351 F.3d 410, 415-16 (9th Cir. 2003); *Liston v. County of Riverside*, 120
 12 F.3d 965, 976 n.10 (9th Cir. 1997) (citing several additional cases supporting this proposition).

13 The parties agree that defendants’ decision to apply force to remove plaintiff from his cell
 14 was reasonable. However, they dispute whether the force defendants employed during the cell
 15 extraction, after defendants disarmed plaintiff and secured him, was reasonable. Defendants
 16 acknowledge that there is not a video recording of this portion of their encounter with plaintiff to
 17 resolve any outstanding questions about what occurred in plaintiff’s cell, but urge this court to award
 18 summary judgment based on the video coverage of the remaining portions of the interaction with
 19 plaintiff, defendants’ declarations, and the fact that plaintiff injured an officer with a handmade
 20 weapon. As noted above, the court declines to rely on the video submitted by defendants in order
 21 to make its determination, as the video was not properly authenticated. Further, the video does not
 22 resolve the outstanding factual dispute about the reasonableness of the force applied by defendants
 23 because it does not capture the cell extraction.

24 Defendants ask this court to find that the force employed by defendants was reasonable given
 25 plaintiff’s use of a weapon and his refusal to comply with orders. While the court can understand
 26 why such tense and dangerous circumstances may lead to the use of force in order to subdue or
 27 restrain an inmate, the current dispute is about the force used against plaintiff after he was restrained

1 and defendants removed the weapon from his possession. It is unclear to the court why defendants
 2 would continue to feel threatened in this situation or why ongoing use of force would be necessary
 3 to restore safety, as plaintiff was already restrained.

4 If, as plaintiff claims, defendants engaged in such acts as defendant Deeds ramming
 5 plaintiff's head into the cell wall or defendant Postma slamming him into a sally port door, it seems
 6 quite clear to the court that such acts are wanton and unnecessary. On the other hand, if these acts
 7 did not occur after defendants restrained plaintiff, as defendants claim, then the force used to subdue
 8 plaintiff could be considered necessary in light of the danger posed by plaintiff's use of a weapon.
 9 In other words, absent subsequent violent acts, defendants' use of force would be reasonable. In this
 10 case, the court is left to weigh plaintiff's version of events, as described in his opposition and
 11 declaration, against defendants' motion and declarations, which state that they did not witness or
 12 apply force they consider to be excessive. The court may not resolve such a factual dispute on
 13 summary judgment.

14 **ii. Defendants' Personal Participation**

15 Defendants ask the court to award summary judgment to defendants Perkins and Horsley
 16 because plaintiff did not allege that they used force against him.⁶ Defendant Perkins states that he
 17 did not witness the events that took place in the cell, as he was standing in the stairwell awaiting a
 18 replacement tape and battery. Defendant Horsley claims that he did not "witness any force used on
 19 [plaintiff] that [he] would regard as excessive." However, plaintiff notes that defendant Perkins
 20 turned the camera off to allow his beating without documentation. Further, plaintiff argues that
 21 defendants Perkins and Horsley participated in the event by refusing to aid plaintiff as he was being
 22 beaten. Plaintiff believes that defendants Perkins and Horsley were deliberately indifferent to his
 23 needs during the beating.

24

25 ⁶ Defendants also argue that defendants Horsley, Postma, and Deeds acted at defendant
 26 Minnix's direction; therefore, defendants "request that the Court evaluate their personal involvement only
 27 in terms of the degree of force that they used on [plaintiff]," not for the decision to use physical force. As
 noted above, the parties agree that the decision to use force was reasonable in light of the prison disturbance
 caused by the inmates flooding the unit. Therefore, the relevant inquiry is related to the amount of force
 employed by defendants after they restrained plaintiff.

1 First, “[t]o sustain an action under Section 1983, a plaintiff must show (1) that the conduct
 2 complained of was committed by a person acting under color of state law; and (2) that the conduct
 3 deprived the plaintiff of a federal constitutional or statutory right.” *Wood v. Ostrader*, 879 F.2d 583,
 4 587 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990). A person deprives a plaintiff of his
 5 constitutional right “if he does an affirmative act, participates in another’s affirmative acts, or omits
 6 to perform an act which he is legally required to do that *causes* the deprivation.” *Leer v. Murphy*,
 7 844 F.2d 628, 633 (9th Cir. 1988) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)
 8 (emphasis in original)).

9 Second, defendants correctly note that the deliberate indifference standard does not apply “in
 10 the context of quelling prison disturbance” (#26, p. 4 (citing *Hudson*, 503 U.S. 1, 6 (1992))). Rather,
 11 the court must consider whether “the force was applied in a good faith effort to maintain or restore
 12 discipline or maliciously and sadistically for the very purpose of causing harm.” *Hudson*, 503 U.S.
 13 at 6 (quoting *Whitley*, 475 U.S. at 320-21 (1986)).

14 In this case, plaintiff accuses defendant Perkins of turning off the camera to allow defendants
 15 to beat him without documentation, and for subsequently failing to protect him. Plaintiff also
 16 accuses defendant Horsley of failing to protect him from the beating, despite his training and
 17 authority as a senior officer on the Correctional Emergency Response Team (“CERT”). While these
 18 acts do not constitute the direct application of force against plaintiff, the court finds that they are
 19 omissions or failures to act to protect defendant, which may have resulted in the deprivation of his
 20 constitutional rights. A failure to act can constitute conduct that deprives a plaintiff of his
 21 constitutional rights within the meaning of Section 1983. Further, as detailed above, plaintiff claims
 22 that the acts of excessive force occurred after he was restrained; arguably, a time after which
 23 defendants addressed any threat of unrest that plaintiff posed. Therefore, defendants are not excused
 24 from potential liability for their indifference simply because the encounter began as a planned use
 25 of force to quell a prison disturbance, particularly when it seems that the operation may have
 26 degenerated into the application of unreasonable and unnecessary force.

27 Therefore, the court declines to award summary judgment to defendants Perkins and Horsley,

1 as there is a genuine question of material fact as to their participation in the events that occurred on
2 January 31, 2010.

3 **3. Qualified Immunity**

4 “The doctrine of qualified immunity protects government officials from liability for civil
5 damages insofar as their conduct does not violate clearly established statutory or constitutional rights
6 of which a reasonable person would have known.” *Clouthier v. County of Contra Costa*, 591 F.3d
7 1232, 1240 (9th Cir. 2010) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73
8 L.Ed.2d 396 (1982)). “In considering a claim of qualified immunity, the court must determine
9 ‘whether the facts that plaintiff has alleged . . . make out a violation of a constitutional right,’ and
10 ‘whether the right at issue was clearly established at the time of the defendant’s alleged
11 misconduct.’” *Id.* (quoting *Pearson v. Callahan*, --- U.S. ----, 129 S.Ct. 808, 815, (2009)). Whether
12 a right is clearly established turns on the “objective legal reasonableness of the action, assessed in
13 light of the legal rules that were clearly established at the time it was taken.” *Id.* “[A]ll but the
14 plainly incompetent or those who knowingly violate the law have immunity from suit; officers can
15 have a reasonable, but mistaken, belief about the facts or about what the law requires in any given
16 situation.” *Id.*

17 Here, as indicated above, there are outstanding questions of material fact regarding
18 defendants’ conduct. It would be understandable for defendants to claim that, in light of the
19 dangerous circumstances of disarming an inmate, the application of force to restrain him was
20 reasonable. However, the instant dispute is about the amount of force defendants applied *after* they
21 disarmed and restrained plaintiff. There is simply no merit to the argument that defendants should
22 be shielded from liability because they did not know that beating an inmate while he is restrained
23 is unlawful or because they believed such conduct is reasonable. If, as plaintiff alleges, defendants
24 engaged in violent acts against him after he was restrained, such as punching him in the face or
25 beating his head against a wall, defendants would surely have been aware of the unlawfulness of
26 their actions. There are simply too many unanswered questions regarding defendants’ conduct to
27 apply the shield of qualified immunity. Therefore, the court declines to grant summary judgment

1 to defendants based on qualified immunity.

2 **III. CONCLUSION**

3 Based on the foregoing and for good cause appearing, the court recommends that defendants'
4 motion for summary judgment (#22) be **DENIED**. The parties are advised:

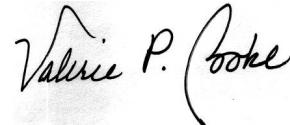
5 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
6 the parties may file specific written objections to this Report and Recommendation within fourteen
7 days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
8 Recommendation" and should be accompanied by points and authorities for consideration by the
9 District Court.

10 2. This Report and Recommendation is not an appealable order and any notice of appeal
11 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

12 **IV. RECOMMENDATION**

13 **IT IS THEREFORE RECOMMENDED** that defendants' motion for summary judgment
14 (#22) be **DENIED**.

15 **DATED:** July 1, 2011.



16 **UNITED STATES MAGISTRATE JUDGE**

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